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PADDA GURTAJ SINGH & ORS v. AXIATA GROUP BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN JC
[ORIGINATING SUMMONS NO: WA-24NCC(ARB)-41-09-2021]
B 29 MARCH 2022

Abstract – *The High Court has wide powers to issue interim measures even against a non-party to an arbitration agreement and where the arbitral tribunal itself would not have been able to do so, as the interim measures are targeted at a third party.*

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CIVIL PROCEDURE: *Injunction – Interim – Injunctive reliefs – Injunction restraining company from selling shares in sale of shareholding and to prohibit company from amending, varying or otherwise changing terms of agreement – Preservation of status quo to ensure arbitration proceedings would not become academic – Whether Arbitration Act 2005 permits granting of injunctive reliefs against non-party to arbitration agreement – Whether there was pre-existing cause of action to grant injunction sought – Whether interim measures sought necessary – Arbitration Act 2005, ss. 11 & 19J*

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CIVIL PROCEDURE: *Striking out – Application for – Application to strike out application for injunctive reliefs – Injunctive reliefs sought to restrain company from selling shares in sale of all its shareholding and to prohibit company from amending, varying or otherwise changing terms of agreement – Preservation of status quo to ensure arbitration proceedings would not become academic – Whether Arbitration Act 2005 permits granting of injunctive reliefs against non-party to arbitration agreement – Whether there was pre-existing cause of action to grant injunction sought – Whether interim measures sought necessary – Whether application ought to be struck out – Arbitration Act 2005, ss. 11 & 19J*

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In this application ('encl. 57'), the plaintiffs sought interim measures under ss. 11 and 19J of the Arbitration Act 2005 ('AA') or under the inherent jurisdiction of this court to preserve the *status quo* to ensure that the arbitration proceedings in relation to the shareholders' agreement ('SHA') of the ninth defendant, Tune Talk Sdn Bhd ('TTSB'), would not become academic. The plaintiffs were the shareholders of TTSB which was a mobile virtual network operator ('MVNO'). TTSB was regulated by both its Articles of Association and the SHA. The core factual basis upon which this application was mounted were: (i) Axiata Group Berhad ('AGB') had announced a proposed sale of its entire shareholding in CAB to Digi.com Bhd ('Digi'). Digi was specifically named in the definition of a 'Competitor' in the SHA; (ii) in the sale announcements, the relevant shares registered in the name of the third defendant, Celcom Mobile Sdn Bhd ('CMSB') in TTSB were specifically mentioned as being part of the intended sale; (iii) shares

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owned by CAB in another company, Merchantrade Sdn Bhd, were specifically carved out of the intended sale; and (iv) however, the relevant shares were not carved out and instead were included in the intended sale. The plaintiffs contended that the actions of AGB had resulted in a breach of the SHA by its ultimate subsidiary CMSB, in that, there was a 'proposed transfer of shares or other interests' resulting in a change of control of CAB and CMSB. The plaintiffs subsequently issued a notice of material breach. The plaintiffs then issued a letter to TTSB and its company secretary giving notice that CAB and CMSB failed to remedy the event and the material breach. The letter demanded for the resignation of the directors appointed by CAB and/or CMSB. A compulsory transfer notice for all the relevant shares was also issued. Both CAB and CMSB denied the allegations and the directors nominated by CMSB refused to tender their resignations. This culminated into a dispute of notice which was then referred to arbitration. Pending the said arbitration, the plaintiffs filed encl. 37, seeking (i) an injunction restraining AGB from selling the relevant shares in its intended sale of all its shareholding in CAB to Digi ('prayer A'); (ii) an injunction to prohibit CAB from amending, varying or otherwise changing the terms of the MVNO agreement with TTSB ('prayer B'); and (iii) (a) the directors of TTSB nominated by CMSB be prohibited by an injunction from casting any vote on any decision of the Board of Directors of TTSB; and (b) no decision requiring a positive note by CAB or CMSB pursuant to the SHA or the company's constitution may be made unless with the agreement of all the remaining shareholders of TTSB ('prayer C (i) and (ii)'). Both AGB and CAB/CMSB filed encls. 7 and 8, respectively, to strike out encl. 37. AGB contended that the AA did not permit injunctive reliefs to be granted against a non-party to the arbitration agreement and there was no pre-existing cause of action against AGB to enable this court to grant the injunction sought. CAB/CMSB, on the other hand, contended that the interim measures sought were unnecessary given that an undertaking had been given that CMSB's entire shares in TTSB shall remain unencumbered and that, in the event the plaintiffs were to prevail in the arbitration, CMSB would be able to transfer their entire shareholdings in TTSB in accordance with the terms of the shareholders' agreement. In addition, it was contended that the scope of the interim measures would result in a change to the *status quo.*

Held (allowing prayer A of encl. 37; dismissing encls. 7 and 8):

(1) AGB's sale of its entire shareholdings in CAB had been announced to expressly include the relevant shares. Prayer A of the interim measures prayed for in encl. 37 was seeking only to prohibit AGB from including the relevant shares in the intended sale of its entire shareholding in CAB to Digi. This was clearly related to the arbitration proceedings as the final awards contemplated by the plaintiffs in the arbitration proceedings included an order for CAB/CMSB to sell the relevant shares to the shareholders in accordance to the terms of the SHA in the event of a

material breach. The injunction order was not directly related to the end results of the arbitration or indeed granting the same broad reliefs sought in arbitration proceedings. The purpose of this court intervening was purely to ensure that the arbitration did not become academic or nugatory. By requiring that there be no change in control of any interest in the relevant shares, the plaintiffs were merely asking this court to preserve the *status quo* until the arbitration proceedings was disposed of. (paras 54 & 55)

(2) The terms of the injunctive order required AGB to refrain from including the relevant shares from the sale of its entire shareholding in CAB to Digi. This was nothing more than preserving the *status quo* prior to the intended sale. If it was necessary, the relevant shares could be transferred to an existing shareholder of TTSB to hold in escrow or even to AGB. Even if this meant that some positive acts may have to be taken for the relevant shares to be preserved, it did not mean that the plaintiffs need to satisfy the court based on the high standard required for a mandatory injunctive. The interim measures issued under s. 19J(1) of the AA were intended to be just that *ie*, interim and that in granting the same, the court was not to unnecessarily express its view on the merits or otherwise of the issues before the arbitral tribunal. As long as the court was of the view that there was urgency and the interim measure would aid, support or facilitate the arbitral proceedings *ie*, necessary to maintain *status quo* or for preservation of the subject matter and did not impede the arbitral proceedings and protect the effectiveness of its final awards, this should suffice for the court to issue the interim measure in the form of an injunctive order. (para 58)

(3) The plaintiffs' concerns were the potential harm that could arise with Digi as a competitor of TTSB, being directly in control of CAB and indirectly in control of the relevant shares and CMSB during the period when the arbitration proceedings were still pending. The risks of harm to the plaintiffs and TTSB arising may result in irreparable loss or render any final awards in favour of the plaintiffs academic or nugatory. In other words, the risks to the plaintiffs extended beyond merely preserving their rights to purchase the proportionate relevant shares. It was also necessary to preserve the *status quo* in terms of the control of CAB and CMSB. The undertaking itself was insufficient to preserve the *status quo* pending the arbitration proceedings. (para 71)

(4) There was no necessity for this court to issue any further interim measures once an injunctive order was granted restraining AGB from selling the relevant shares to Digi. This would effectively restore the *status quo*. To issue the injunctive orders as applied for by the plaintiffs in prayers B and C (i) and (ii) would be to interfere with the terms of the MVNO and the SHA. This would be making a change to the existing

status quo instead of preserving the same which was outside the scope of s. 19J(1) of the AA. The plaintiffs had not demonstrated that there was any urgency for such interim measures to be issued and/or that such application, if deemed fit, could not be made to the arbitral tribunal under s. 19(1) and (2) of the AA. Therefore, the court was not inclined to grant the injunctions as prayed in prayers B and C (i) and (ii) of encl. 37. (paras 80-83)

Case(s) referred to:

Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp Ltd [1981] 1 Llyod's Rep 253 ***(refd)***

Cetelem SA v. Roust Holdings Ltd [2005] 1 WLR 3555 ***(refd)***

Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd & Ors [1993] AC 334 ***(refd)***

Coppe'e-Lavalin SA/NV v. Ken-Ren Chemicals and Fertilisers Ltd (in liq); Voest-Alpine AG v. Ken-Ren Chemicals and Fertilisers Ltd (in liq) [1994] 2 All ER 449 ***(refd)***

Dow Chemicals v. Isover Saint-Gobain, ICC Award No. 4131 ***(refd)***

Gibb & Co v. Malaysia Building Society Bhd [1982] CLJ (Rep) 99; [1982] 1 CLJ 185 FC ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

KNM Process Systems Sdn Bhd v. Lukoil Uzbekistan Operating Company LLC [2020] 1 LNS 479 CA ***(refd)***

Mahanagar Telephone Nigam Ltd v. Canara Bank 2019 SCC Online SC 995 ***(refd)***

NCC International AB v. Alliance Concrete Singapore Pte Ltd [2008] SGCA 5 ***(refd)***

Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors [2021] 4 CLJ 821 FC ***(refd)***

Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd & Ors [1998] 3 CLJ 275 CA ***(refd)***

Siskina (Owners of cargo lately on board) v. Distos Compania Naviera SA [1979] AC 210 ***(refd)***

TSB Private Bank International SAv. Chabra [1992] 1 WLR 231 ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 2(1), 5, 8, 11(1)(f), (h), 19(1), (2)(a), (b), (c), 19J(1)

Arbitration Act 1996 [UK], s. 44

For the plaintiff - K Shanmuga & Fahri Azzat; M/s Kanesalingam & Co
For the 1st-3rd defendants - HR Dipendra, Gary Yap Vern Chieh & Hemashini Kurup; M/s Koh Dipendra Jeremiah Law
For the 4th-7th defendants - Logan Sabapathy & Vivian Oh; M/s Logan Sabapathy & Co
For 8th defendant - Chong Yee Lim, Alfred; M/s A Chong & Co
For 9th defendant - Foo Joon Liang & Kang Mei Yee; M/s Gan Partnership

Reported by Lina E

JUDGMENT

Ong Chee Kwan JC:

Introduction

[1] The amended originating summons ('encl. 57') seeks interim measures under ss. 11 and 19J of the Arbitration Act 2005 or under the inherent jurisdiction of this court. The purpose is to preserve the *status quo* to ensure

A that the arbitration proceedings in relation to the shareholders agreement of the nineth defendant company ('the company' or 'TTSB') will not become academic.

[2] The third defendant ('CMSB') is a wholly owned subsidiary of the second defendant ('CAB'), who in turn is a wholly owned subsidiary of the
B first defendant ('AGB'). CMSB became a registered shareholder of shares in the ninth defendant on 18 June 2021. Prior to this date, CAB was the registered shareholder of the shares.

[3] The dispute revolves around the proposed sale by AGB of its entire shareholding in CAB. It is the plaintiffs' case that this proposed sale triggered
C an 'Event' and constitutes a 'Material Breach' of the shareholders agreement between the parties, resulting in CMSB being compulsorily required to sell its entire shareholding in TTSB to the remaining shareholders of the company at par plus 10%. Both CAB and CMSB categorically deny the plaintiffs' allegation.

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[4] Notwithstanding that AGB is a non-party to the shareholders agreement which contains an arbitration agreement, the plaintiffs seek interim measures in the form of injunctive orders against AGB as well as CAB and CMSB.

E **[5]** Not surprisingly, AGB's main objection to the application is that the Arbitration Act 2005 ('the AA 2005') does not permit injunctive reliefs to be granted against a non-party to the arbitration agreement. It is further contended that there is no pre-existing cause of action against AGB to enable this court to grant the injunction sought.

F **[6]** As regards CAB and CMSB, the main objection to the application is that the interim measures sought are unnecessary given that an undertaking has been given that CMSB's entire shares in TTSB shall remain unencumbered and that in the event the plaintiffs were to prevail in the arbitration, CMSB will be able to transfer their entire shareholdings in TTSB
G in accordance with the terms of the shareholders agreement. In addition, it is contended that the scope of the interim measures will result in a change to the *status quo*.

[7] Both AGB and CAB/CMSB have filed their respective applications under encls. 7 and 8 to strike out the plaintiffs' action herein. The decision
H on encl. 37 will also determine the striking out applications.

Background Facts

[8] The plaintiffs are shareholders of TTSB which is a Mobile Virtual Network Operator ('MVNO').

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[9] A complete list of shareholders and, where relevant, key persons within the shareholders, with their abbreviations, is set out below:

Abbreviation	Shareholders and related persons	Registered Shares	Percentage (Approx.) (%)
'GS'	Padda Gurtaj Singh GS also contends, in various other pending civil suits and arbitrations, that he is the only shareholder entitled to receive a transfer of: a) the remaining 429,908 shares of JL; b) all shares of TSIL; and c) all shares owned by TG, LKO, ML and KH.	1,465,518	9.77
'EPC'	East Pacific Capital Pte Ltd	878,213	5.85

Abbreviation	Shareholders and related persons	Registered Shares	Percentage (Approx.) (%)
'DM'	- Dennis Nicholas Melka (sole shareholder and director)		
'TSIL' 'SCP'	Tune Strategic Investments Limited - Datuk Mohd Aqliff Shane Abdullah (sole shareholder & director)	2,160,614	14.40
'TG' 'TF' 'KM'	Tune Group Sdn Bhd - Tony Fernandes (50%) - Kamarudin Meranun (50%)	3,770,753	25.14
'LKO'	Lim Kian Onn, Datuk	472,747	3.15
'ML'	Christopher Mark Anthony Lankaster	97,500	0.65

'KH'	Kalimullah bin Masheerul Hassan, Datuk Seri	472,747	3.15
'JL'	Jason Jonathan Lo	431,908	2.88
'CMSB' 'CAB' 'Celcom' 'AGB'	Celcom Mobile Sdn Bhd or CMSB is a wholly owned subsidiary of Celcom Axiata Berhad (formerly known as Celcom [Malaysia] Berhad) CMSB and CAB CAB is in turn a wholly owned subsidiary of Axiata Group Berhad (formerly known as TM International Berhad) CAB shares in TTSB were only recently transferred to CMSB, after the first seeds of the dispute between the parties arose.	5,250,000 **(the Relevant Shares')**	35.00
	Total	**15,000,000**	**100.00**

[10] The company was incorporated in 2006. It is regulated by both its Articles of Association ('the articles'), and the shareholders agreement dated 23 December 2008 ('the SHA').

Article 168 of the Articles and Clause 7.1 of the SHA provide that where there is a conflict between the Articles and the SHA, the SHA shall prevail.

[11] CAB is one of Malaysia's three leading mobile telecommunications providers. It became a shareholder of TTSB upon the signing of the SHA. Further:

(i) CAB is a wholly owned subsidiary of AGB, a public company listed on the main market of the Bursa Malaysia ('Bursa');

(ii) AGB was previously known as TM International Bhd, and is indirectly a successor to the Malaysian Government's telecommunications agency known as Telekom Malaysia ('TM');

(iii) AGB owns and operates mobile telecommunications services in various countries in Asia through a network of subsidiaries;

(iv) at the time the agreement was signed, AGB made an announcement on the Bursa website of its investment in TTSB through CAB.

[12] CMSB is in turn a wholly owned subsidiary of CAB.

[13] TTSB is a mobile virtual network operator or MVNO.

(i) In simple terms, this means TTSB provides mobile communications services to consumers, using the network infrastructure of another company (called a Mobile Network Operator ('MNO'));

(ii) Currently, TTSB uses CAB's network, which is regulated by a wholesale agreement which includes details of the price TTSB can charge its customers;

(iii) This wholesale agreement or 'MVNO agreement' is referred to in the SHA, and at the time of the SHA, was dated 26 December 2008;

(iv) TTSB has obtained all necessary licences and pays licence fees annually to the MCMC. TTSB is the only MVNO that has all levels of licences in Malaysia and is the only MVNO that can issue its own SIM-cards. It has its own phone number series.

[14] Digi.com Berhad ('Digi') is a public company also listed on the main market of Bursa.

(i) Digi is an MNO, and a direct competitor to CAB and TTSB in the provision of mobile telecommunications in Malaysia;

(ii) Telenor Asia Pte Ltd ('Telenor') is a Norwegian majority state-owned international provider of tele, data and media communications services. It owns a substantial shareholding in Digi.

[15] Digi is specifically listed as a "competitor" in the articles and the SHA. More specifically, cl. 1.1 of the SHA defines "competitor" as follows:

> ... Competitor means any of the following entity *(sic)*, other than a Related Corporation of Celcom:
>
> a) a licensed operator providing communications services;
>
> b) Maxis, **DiGi**, U Telecom Media (previously known as MiTV), Time and their respective Related Corporation ... (emphasis added)

For completeness, 'Related Corporation' means:

> (i) a corporation ('Holdco') which holds more than 50% of the shares in a company;
>
> (ii) a corporation where Holdco holds more than 50% of the shares (*ie*, where Holdco holds more than 50% of the shares in this corporation).

[16] The SHA provides, among other things, as follows:

13.1 Clause 9 provides, in general terms, that no shareholder is allowed to transfer its shares in TTSB to anyone who is not a shareholder ('Third Party') without ensuring the Third Party makes a 'Tag-Along' offer to all other shareholders.

13.2 In any event, there is a blanket prohibition on a sale of TTSB shares to a Competitor (Clause 9.7) or to a Competitor holding shares 'directly or indirectly' in any Shareholder (Clause 9.12).

13.3 More specifically, Clause 9.12 provides as follows:

> All Shareholders, being corporate entities, agree that no person being a Competitor shall hold shares directly or indirectly in that Shareholder.

13.4 Clause 10.1 defines various 'Events' which give rise to a compulsory transfer of a member's shares in TTSB. An Event occurs in, amongst others, the following circumstances:

13.4.1 Where a shareholder is a body corporate, partnership or other entity, an Event occurs upon 'any proposed transfer of shares or other interests' in such shareholder 'which results in a change in Control' of that shareholder (Clause 10.1(j))

13.4.2 When there is, among others, a breach of Clause 9 (including clause 9.12 prohibiting indirect shareholding by a Competitor), this amounts to what is defined as a Material Breach of the SHA. (Clause 10.1)

13.4.3 Where the Material Breach is capable of remedy, an Event within the meaning of Clause 10 occurs if the breach is not remedied within 30 days of a notice to do so. (Clause 10.1(a))

13.5 Whenever an Event occurs, a Compulsory Transfer Notice is deemed as served by the Shareholder who has committed or suffered an Event ('the Event Shareholder') of its entire shareholding in TTSB ('the Relevant Shares'). The price at which the transfer occurs differs depending on whether the Event is also a Material Breach. (Clause 10.2)

13.6 Underlying the entire agreement are the provisions in clause 14.1 requiring that the parties to the SHA deal with each other in good faith.

[17] It is the plaintiffs' case that the provisions of the SHA show the intention of the parties to the SHA to 'share and share alike' – if any one party wanted to monetise their investment by any form of sale to a third party, they must ensure that they share the bounty with their co-shareholders. The scheme of the SHA showed each shareholder jealously guarded its investment in TTSB and its right to determine who it goes into business with. It therefore gives all the existing shareholders every opportunity to take over the shares of any exiting shareholder internally, before it can seek to sell its shares to a third party. And even then, there is an absolute prohibition for sales to competitors.

[18] The core factual basis upon which this application is mounted is not significantly in dispute. Essentially: A

(i) On 21 June 2021, AGB has announced a proposed sale of its entire shareholding in CAB to Digi. Digi is specifically named in the definition of a competitor in the SHA.

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(a) In the sale announcements, the relevant shares registered in the name of CMSB in TTSB are specifically mentioned as being part of the intended sale;

(b) Shares owned by CAB in another company, Merchantrade Sdn Bhd, are specifically carved out of the intended sale; C

(c) However, the relevant shares in TTSB were not carved out, and instead were included in the intended sale;

(d) This was done notwithstanding protests by the plaintiffs that the intended sale would be a breach of the SHA. D

(ii) The plaintiffs contended that this means the actions of AGB have resulted in a breach of the SHA by its ultimate subsidiary CMSB, in that there is a 'proposed transfer of shares or other interests' resulting in a 'change in control' of CAB and CMSB.

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(a) CMSB is the current registered owner of the relevant shares ultimately owned by AGB. CAB was the registered owner of the relevant shares from December 2008 until 18 June 2021 when CAB exercised its rights under cl. 9.10(b) of the SHA and transferred the same to CMSB.

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(b) The plaintiffs submit that the last-minute transfer of the relevant shares to CMSB (a mere three days before the sale announcement) was a failed bad faith attempt to circumvent the provisions of the SHA.

[19] The plaintiffs contended that the provisions of the SHA came into effect requiring CMSB's shares in TTSB to be compulsorily transferred to the remaining shareholders through a defined procedure in the SHA. G

[20] On 29 June 2021, the plaintiffs issued a notice of material breach ('the notice') alleging that the proposed merger between CAB and Digi constituted a breach resulting in a change of control in CAB and CMSB which would allow Digi, as a competitor, to gain an indirect shareholding in TTSB in contravention of cl. 9.12 of the SHA. H

[21] The notice stated that if the breach was not remedied within a period of 30 business days, a material breach would be deemed to have occurred and thereafter a Compulsory Transfer Notice ('CTN') would be deemed to have been issued in respect of all the relevant shares at the subscription/ I

A acquisition price plus 10%. On 27 July 2021, both CAB and CMSB replied *via* their solicitors denying the alleged breach stating that no event or material breach had occurred requiring any remedy.

[22] On 18 August 2021, the plaintiffs issued a letter to TTSB and its company secretary giving notice that CAB and CMSB had failed to remedy B the event and the material breach. The letter demanded for the resignation of the directors appointed by CAB and or CMSB. On the same date, a CTN for all the relevant shares was also issued.

[23] On 23 August 2021, both CAB and CMSB *vide* their solicitors denied the allegations of material breach and the validity of the CTN. The directors C nominated by CMSB to TTSB also refused to tender their resignations as demanded.

[24] The aforesaid culminated in the dispute notice dated 24 August 2021 and the disputes have been referred for arbitration. Suffice it to state that the D above are matters for the arbitration proceedings, namely whether the intended sale is a breach of cls. 9.12 and 10.1(j) of the SHA prohibiting competitors holdings shares 'directly or indirectly' in any shareholder, and thus a material breach of the SHA.

[25] Pending the resolution of the disputes before the arbitral tribunal, the E plaintiffs filed the present encl. 37 seeking the following interim measures:

(i) AGB be prohibited by an injunction from including the relevant shares in TTSB registered in the name of CMSB in the proposed sale of AGB's entire shareholding in CAB to Digi ('prayer A');

F (ii) CAB by itself or through its servants' officers or agents or otherwise howsoever be prohibited by an injunction from amending varying or otherwise changing howsoever the terms on which CAB provides network services to TTSB ('prayer B');

(iii) notwithstanding the terms of the SHA and the constitution of TTSB ('the G company's constitution');

(a) the directors of TTSB nominated by CMSB be prohibited by an injunction from casting any vote on any decision of the Board of Directors of TTSB ('prayer C(i)'); and

H (b) no decision requiring a positive vote by CAB or CMSB pursuant to the SHA or the company's constitution may be made unless with the agreement of all the remaining shareholders of TTSB. ('prayer C (ii)').

Court's Deliberations

I **[26]** I will deal firstly with the interim measures sought against AGB, namely, an injunction refraining AGB from selling the relevant shares in its intended sale of all its shareholdings in CAB to Digi under prayer A of encl. 37.

Prayer A – High Court's Jurisdiction To Order Interim Measures Against Non-party

[27] The starting point in evaluating the court's jurisdiction in matters concerning arbitration is s. 8 of our AA 2005 which states:

> 8. No court shall intervene in matters governed by this Act, except where so provided in this Act

[28] The aforesaid underscores the principle of minimum intervention by the courts in matters provided under the AA 2005 reserved for the arbitral tribunal. In fact, the s. 8 is modelled after s. 5 of the UNCITRAL Model Law which provides that '[I]n matters governed by this law, no court shall intervene except so provided in this law'.

[29] The UNCITRAL Secretariat had noted that the said provision 'exclude any general or residual powers' given to the courts, giving precedence to the concept of party autonomy for arbitration proceedings. The purpose is to achieve certainty as to the limits and maximum amount of judicial intervention. In fact, our Court of Appeal in *Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd & Ors* [1998] 3 CLJ 275; [1998] 2 MLJ 20 at 25 had approved and followed the House of Lords decision in *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp Ltd* [1981] 1 Llyod's Rep 253 concluding that the High Court has no non-statutory power to intervene in arbitrations whether by way of inherent jurisdiction or at common law.

[30] Insofar as the powers of the High Court to order interim measures are concerned, the relevant provisions are contained in ss. 11 and 19J of the AA 2005.

[31] The salient provisions of the AA 2005 as last amended by the Arbitration (Amendment) (No. 2) Act 2018 (Act A1569) are as follows:

> The Interpretation Section 2(1) of the Act states that 'unless the context otherwise requires', the following words have the following meaning:
>
> "party" means a party to an arbitration agreement or, in any case where an arbitration does not involve all the parties to the arbitration agreement, means a party to the arbitration;
>
> …
>
> "international arbitration" means an arbitration where:
>
> (a) one of the parties to an arbitration agreement, at the time of the conclusion of that agreement, has its place of business in any State other than Malaysia;
>
> …
>
> Section 11(1) of the AA 2005, after its amendment in 2018, now reads as follows:

Section 11. Arbitration agreement and interim measures by High Court

(1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to:

(a) maintain or restore the *status quo* pending the determination of the dispute;

(b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;

(c) provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;

(d) preserve evidence that may be relevant and material to the resolution of the dispute; or

(e) provide security for the costs of the dispute.

[32] Section 19J(1) of the AA 2005 which was also added by the amendments in 2018 expressly provides the court with wide jurisdiction to grant appropriate interim measures. The section in its entirety reads as follows:

Court-ordered interim measures

19J. (1) The High Court has the power to issue an interim measure in relation to arbitration proceedings, irrespective of whether the seat of arbitration is in Malaysia.

(2) The High Court shall exercise the power referred to in subsection (1) in accordance with its own procedures in consideration of the specific features of international arbitration.

(3) Where a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application.

[33] Looking at both the ss. 11(1) and 19J(1), it seems to me obvious that s. 11(1) is applicable only when an application is made by a party to the arbitration agreement seeking from the High Court interim measures against another party to the arbitration agreement. This is clear given the definition of the word 'party' in s. 2(1) of the AA 2005.

[34] Thus, whilst I accept the contention by learned counsel for the plaintiffs that the words 'for the party to' in s. 11(1) must necessarily refer to someone other than the party who makes the application to the High Court, I am unable to agree that the very same words allow for the High

Court to order interim measures under the said section against a non-party to the arbitration agreement. To do so would be going against the clear definition of the word 'party' provided under the said s. 2(1) of the AA 2005.

[35] However, whilst s. 11(1) is applicable only to parties to the arbitration agreement, s. 19J(1) contains no such restrictions at all.

[36] In my view, s. 19J(1) gives the High Court the powers to grant interim measures as long as the interim measures are 'in relation to arbitration proceedings'. Further, the granting of the interim measures by the High Court is not subject to the conditions stipulated in s. 19A which apply when a party requests for interim measures under s. 19(2)(a), (b) or (c) from the arbitral tribunal.

[37] However, Section 19J(1) must be read in the light of s. 8 which when taken together necessarily means that the court is to intervene only in the limited circumstances where the curial intervention is intended to support the arbitration proceedings. The court's role is simply to provide supportive and limited supervisory functions over the arbitration proceedings based on the powers expressly provided under the AA 2015. There is no room for any residual or general powers under the common law. As stated, this is to promote certainty and to give primacy to the arbitration agreement between the parties. In the application of the powers in s. 19J(1), care must be taken for the court not to determine or prejudge the disputes that are before the arbitrator.

[38] The aforesaid is consistent with the intention of Parliament. Section 19J(1) was inserted in the 2015 Arbitration Act pursuant to the Arbitration Amendment (No. 2) Act 2018 (the 'Amendment Act') to bring our Malaysian arbitration framework in line with the latest revision of the UNCITRAL Model Law and arbitration laws of leading jurisdictions.

[39] The provisions of the UNCITRAL Model Law relevant to ss. 11 and 19J are as follows:

> **Article 5. Extent of court intervention**
>
> In matters governed by this Law, no court shall intervene except where so provided in this Law.
>
> **Article 9. Arbitration agreement and interim measures by court**
>
> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.
>
> **Article 17 J. Court-ordered interim measures**
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> A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

[40] In the commentary on art. 9 in the Digest of Case Law on the UNCITRAL Model Law published by UNCITRAL itself, it is specifically pointed out at p. 53, para. 5 that one of the reasons it may be appropriate for a court to be given powers to grant interim measures is 'where a measure needs to be granted against a third party over which the arbitral tribunal has no jurisdiction'. The commentary goes on to state, relying on the decision in the *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd & Ors* [1993] AC 334, UKHL as quoted in *NCC International AB v. Alliance Concrete Singapore Pte Ltd* [2008] SGCA 5, [2008] 2 SLR (R) 565 as follows:

> 56 In the House of Lords decision of *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] AC 334 ("*Channel Tunnel Group*"), Lord Mustill expressed a similar view. In that case, the plaintiffs issued a writ seeking an injunction from the court to compel the defendants to continue the work of building a tunnel under the English Channel after a dispute arose between them. The defendants sought to stay the plaintiffs' action because the contract between the parties provided for final settlement of disputes by arbitration in Brussels. The House of Lords ruled in favour of the defendants and granted a stay of the action.
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> 57 In his judgment, Lord Mustill stated at 365 that:
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> > The purpose of interim measures of protection ... is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute.

[41] In the present case, when I posed to learned counsel for AGB that if it were CAB that is seeking to sell or transfer the relevant shares to Digi and an urgent application is made to the court by a party to the arbitration proceedings for an injunction to restrain any dealings with the relevant shares pending the determination of the disputes by the arbitral tribunal, whether he would agree that such an injunction ought to be granted to preserve the *status quo*, learned counsel for AGB very candidly conceded. In granting such an order, it would not be considered as usurping the authority of the arbitral tribunal as the court is not in any way determining the merits of otherwise of the dispute, namely, whether the sale or transfer of the relevant shares constitutes an 'event' or 'material breach' under the SHA.

[42] Such interim measure in the form of an injunctive order merely seek to aid and assist the arbitral process by preserving the *status quo* of the relevant shares pending the arbitral tribunal's determination of the disputes before it.

[43] However, CAB had on 18 June 2021 taken the steps to transfer the relevant shares to CMSB before AGB made the sale announcement that it is entering into a merger with Digi and to this end AGB would be selling its

entire shareholdings in CAB to Digi. In the sale announcement, the relevant shares that are now registered in the name of CMSB are specifically mentioned as being part of the intended sale.

[44] By the transfer of the relevant shares, CAB has introduced an additional layer to the shareholder of the relevant shares – instead of CAB holding the relevant shares, CAB now holds the shares in CMSB who in turn holds the relevant shares.

[45] Hence, notwithstanding that it is expressed in the sale announcement that the relevant shares are to be included in the intended sale of AGB's entire shareholdings in CAB to Digi, there is effectively no 'proposed transfer of shares or other interests' in CMSB 'which results in a change in Control' of CMSB since it is the shares in CAB and not CMSB that are intended to be sold. Even then, it is to be sold by AGB who is not a party to the SHA at all.

[46] Yet, with the sale of the entire shareholdings of CAB to Digi, Digi would, in theory at least, have total direct control of CAB and indirect control over the relevant shares and CMSB.

[47] Of course, whether the intended sale of the relevant shares in the manner aforesaid amounts to a breach of the terms of the SHA is clearly a matter for the arbitral tribunal to determine. Nevertheless, there is no denying that the prospect of Digi being a competitor assuming direct control of CAB and indirect control of the relevant shares and CMSB in the meantime can give rise to concerns to the existing shareholders of TTSB.

[48] This is because CAB currently provides TTSB with its network services under the MVNO agreement and CMSB has its nominated directors sitting on TTSB's Board of Directors. The terms of the MVNO agreement contain sensitive and confidential information including details of the price that TTSB can charge its customers. The current Chief Executive Officer of TTSB is a nominee of CAB/CMSB. Further, all shareholders of TTSB have a right to regular management, financial information and copies of minutes of Board of Directors' meetings as reasonably requested (See: SHA, cl. 8.4).

[49] It is beyond dispute that Digi is an MNO, and a direct competitor to TTSB in the provision of mobile telecommunications in Malaysia.

[50] In the circumstances, the plaintiffs are seeking for the *status quo* to be maintained pending the final resolution of their disputes with CAB and CMSB by the arbitral tribunal, seeking the interim measure under prayer 1 for an injunction restraining AGB from including in its sales of the entire CAB shareholdings the relevant shares.

[51] However, it is contended that this court has no jurisdiction to grant the injunction against AGB since AGB is not a party to the SHA and the arbitration agreement. It is also contended that there is also no basis for issuing an injunction as the relevant shares remained registered in CMSB's name and CAB is not selling its shareholdings in CMSB at all.

[52] Thus, notwithstanding the change in *status quo vis-à-vis* the beneficial ownership of the relevant shares that will result from AGB's intended sale of its entire shareholdings of CAB, as learned counsel for AGB, CAB and CMSB would have it, the court is powerless to issue any injunction as an interim measure to preserve the *status quo* pending the arbitration proceedings.

[53] With respect, I disagree. To my mind, the facts that are presented to this court is precisely the reason why the amendments were made to the AA 2005 in 2018, *ie*, to give the High Court the wider powers to issue interim measure even against a non-party to the arbitration agreement and where the arbitral tribunal itself would not have been able to do so as the interim measure is targeted at a third party.

[54] In this case, AGB's sale of its entire shareholdings in CAB has been announced to expressly include the relevant shares. Prayer A of the interim measures prayed for in encl. 37 is seeking only to prohibit AGB from including the relevant shares in the intended sale of its entire shareholdings of CAB to Digi. This is clearly related to the arbitration proceedings as the final awards contemplated by the plaintiffs in the arbitration proceedings include an order for CAB/CMSB to sell the relevant shares to the shareholders in accordance to the terms of the SHA in the event of a 'material breach'.

[55] To be clear, the injunction order is not directly related to the end result of the arbitration, or indeed granting the same broad reliefs sought in arbitration proceedings. The purpose of this court intervening is to purely to ensure that the arbitration does not become academic or nugatory. By requiring that there be no change in control of any interest in the relevant shares, the plaintiffs are merely asking this court to preserve the *status quo* until the arbitration proceedings is disposed.

[56] Learned counsel for AGB, CAB and CMSB contended that the injunction sought for against AGB is in the nature of a mandatory injunction and goes against the provisions in ss. 11(1) and 19J(1) of the AA 2005. More specifically, it is contended that the relevant shares can only be excluded by transferring the same to a third party which is not only not part of the proposed merger but is contrary to the terms of the SHA. The court was told that this was how the shares owned by CAB in another company, Merchantrade Sdn Bhd, are specifically carved out of the intended sale.

[57] With respect, I do not agree. A

[58] The terms of the injunctive order require AGB to refrain from including the relevant shares from the sale of its entire shareholdings in CAB to Digi. This is nothing more than preserving the *status quo* prior to the intended sale. If it is necessary, the relevant shares can be transferred to an existing shareholder of TTSB to hold in escrow or even to AGB. Even if this B means that some positive acts may have to be taken for the relevant shares to be preserved, it does not mean that the plaintiffs need to satisfy the court based on the higher standard required for a mandatory injunctive. One must be mindful of the fact that the interim measures issued under s. 19J(1) are intended to be just that, *ie*, interim and that in granting the same, the court C is not to unnecessarily express its view on the merits or otherwise of the issues before the arbitral tribunal. As long as the court is of the view that there is urgency and the interim measure will aid, support or facilitate the arbitral proceedings *ie*, necessary to maintain *status quo* or for preservation of the subject matter and does not impede the arbitral proceedings and protect D the effectiveness of its final awards, this should suffice for the court to issue the interim measure in the form of an injunctive order.

[59] In this regard, I would respectfully adopt the approach by Lord Mustill on how the courts should approach applications for interim measures pending arbitration in his dissenting judgment in the House of Lords decision E of *Coppe'e-Lavalin SA/NV v. Ken-Ren Chemicals and Fertilisers Ltd (in liq); Voest-Alpine AG v. Ken-Ren Chemicals and Fertilisers Ltd (in liq)* [1994] 2 All ER 449. At p. 469, Lord Mustill categorised interim measures into three groups, the object of all three 'is to support the agreement to arbitrate, but their effects are not all the same' where His Lordship said: F

> With the first group the national court lends its support by ordering purely procedural steps which the arbitrators either cannot order or cannot enforce; such as requiring an inspection of the subject matter immediately when the dispute has arisen or compelling the attendance of an unwilling witness. *The second group seeks to maintain the status quo pending the making of an award, so as to prevent one party from bringing about a change of circumstances adverse to the other which the arbitrators cannot adequately remedy. An interlocutory injunction is the most characteristic of these remedies.* The third group consists of remedies designed to make sure that the award has the intended practical effect by causing one party to provide a fund to which recourse can be made by the other party if the first fails to honour an adverse award spontaneously. *Saisie conservatoire* and *Mareva* injunctions are typical of this kind of relief. G H
>
> My Lords, it is I believe clear that the frame of mind in which a national court should approach the grant of such measures must be substantially influenced by the category into which they fall. In the case of the first group the court is concerned only to fill a gap which it can do without encroaching on the agreed procedure or the substantive decision-making I

process of the arbitrators. With the third group an application for relief may call for some trespassing on the arbitrator's territory, since in some legal systems the court may be required to assess the apparent strength of the claim in order to decide whether it is just to make an order which interferes with the defendant's right to make free use of his funds. *The second group potentially involves the greatest encroachment, for at the lowest the court will often find it necessary to consider whether a particular state of affairs which the arbitrators are being asked to create or declare (for example whether one party is obliged to do a certain act or abstain from doing another) is likely in the event to be created or declared by the award, in order to decide whether it is just to order holding relief in the shape of an injunction; and the intrusion will of course be even greater where (as in Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] 1 All ER 664,; [1993] AC 384) the interim measure takes the shape of an order that the party shall perform in advance of an award the very obligation the existence of which the arbitrators are in the course of deciding. It is my judgment clear that the approach of the national courts to the grant of interim relief should be conditioned to an important extent by the degree to which the particular remedy encroaches on the agreement that the arbitrators shall be the sole judges of the merits.* (emphasis added)

[60] I read the aforesaid passages to mean that if the court is of the view that an intrusion into the arbitral tribunal's functions will be required before determining whether to issue the interim measures sought, then the court will be more circumspect if the encroachment will effectively take away the decision-making process of the arbitrator. Some intrusions may be called for or even unavoidable, for example, in determining whether the *status quo* has been changed, but not more than is absolutely necessary to come to a view as to whether an interim measure ought to be issued. Where the necessity and urgency of the interim measures outweigh the intrusions, an order for the interim measures ought to be given in the wider interest of preventing harm to the effectiveness of the final award. Needless to say, where the arbitral tribunal has no jurisdiction to grant such interim measures, the case is all the more compelling.

[61] Accordingly, in the exercise of the court's discretion whether to issue an interim injunction as an interim measures under s. 19J(1) or s. 11(1) of the AA 2005, the application of the *American Cynamid* test may not be appropriate. There is no necessity for the court to determine the question whether there is a serious issue to be tried. The fact that matter has been brought before the arbitral tribunal in itself is premised on the existence of a 'dispute'. If the existence of this 'dispute' is challenged, surely then it must be for the arbitral tribunal to determine. It seems to me that if the court were to make a finding at the application for interim measures that there is a serious issue to be tried in respect of the dispute, the court would have prejudged the matter, taking it out of the hand of the arbitral tribunal, if an application is made to challenge the existence of such dispute later.

[62] In fact, the position is even more concerning if the higher standard of demonstrating an unusually sharp and clear case for a mandatory injunction is required (*Gibb & Co v. Malaysia Building Society Bhd* [1982] 1 CLJ 185; [1982] CLJ (Rep) 99). The court will have to unnecessarily make greater intrusion into the arbitral tribunal's decision-making process in such a case.

[63] In our present case, the injunctive order that is sought in Prayer A will have little if at all any bearing on the arbitral tribunal's final award as to whether the intended sale of the entire shareholdings of CAB by AFG would constitute an 'event' and a 'material breach' under the SHA. There is no pre-empting or prejudging of the arbitral tribunal's final awards at all.

[64] That the interim measures issued by the court may include a mandatory injunction is also support by case law. The case of *Cetelem SA v. Roust Holdings Ltd* [2005] 1 WLR 3555, concerned an application for an interim mandatory injunction pending arbitration pursuant to s. 44 of the 1996 UK Arbitration Act. There, the English Court of Appeal stated at [63] that:

> Those powers (under s. 44 of the 1996 UK Act) include a power to grant interim mandatory injunctions, although the authorities make it clear that the court should exercise such a power very sparingly. That would be particularly so in the context of proposed arbitral proceedings …

[65] The court further elaborated (at [71]) that:

> The whole purpose of giving the court power to make such orders is to assist the arbitral process in cases of urgency before there is an arbitration on foot. Otherwise it is all too easy for a party who is bent on a policy of non-cooperation to frustrate the arbitral process. Of course, in any case where the court is called upon to exercise the power (under s. 44 of the 1996 UK Act), it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertakings from the claimant, that the substantive questions are reserved for the arbitrator or arbitrators.

[66] It is also contended that this court cannot grant an injunction as the plaintiffs have not disclosed any pre-existing cause of action at all against AGB. In this regard, the plaintiffs have not commenced any separate action against AGB or joined AGB in the arbitration proceedings.

[67] This proposition is premised on the oft-cited decision of the House of Lords in *Siskina (Owners of cargo lately on board) v. Distos Compania Naviera SA* [1979] AC 210 where Lord Diplock had held that an interlocutory injunction can only be made against a defendant against whom the plaintiff has a cause of action. Lord Diplock at p. 256 of the judgment said:

A A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary
B and incidental to the pre-existing cause of action.

[68] However, learned counsel for the plaintiffs have referred me to the judgment of Mummery J in *TSB Private Bank International SA v. Chabra* [1992] 1 WLR 231 dealing with this very point. After referring to the passage by Lord Diplock in *Siskina (Owners of cargo lately on board) v. Distos Compania*
C *Naviera SA* (*supra*), Mummery J distinguished it on its facts and held that in cases where there are more than one defendant, an injunction can still be granted against a co-defendant where the plaintiff has no cause of action if the injunction is necessary and is ancillary or incidental to the cause of action against the other defendants. The relevant passages are reproduced below:

D It is important to note that in that case there was only one defendant and it was held that, as there was no cause of action against the sole defendant which was justiciable in the High Court and enforceable by final judgment, the court had no jurisdiction to make an interlocutory injunction against the defendant restraining the removal of assets in
E England: see also *Steamship Mutual Underwriting Association (Bermuda) Ltd. v. Thakur Shipping Co. Ltd.* (Note) [1986] 2 Lloyd's Rep. 439.

In the present case there are two defendants. There is one defendant, Mr. Chabra, against whom the plaintiff undoubtedly has a good arguable cause of action: the claim on the guarantee. That is justiciable in the English court; Mr. Chabra is amenable to the jurisdiction of the English
F court to make a final judgment against him on the guarantee. The claim for an injunction to restrain disposal of assets by Mr. Chabra is ancillary and incidental to that cause of action. In my judgment, the claim to a similar injunction against the company is also ancillary and incidental to the claim against Mr. Chabra and the court has power to grant such an
G injunction in an appropriate case. It does not follow that, because the court has no jurisdiction to grant a Mareva injunction against the company, if it were the sole defendant, the court has no jurisdiction to grant an injunction against the company as ancillary to, or incidental, to the cause of action against Mr. Chabra: see for example, *Vereker v. Choi* [1985] 4 NSWLR 277, 283. I agree that such a course is an exceptional
H one, but I do not accept that it is one that the court has no jurisdiction to take.

[69] I would respectfully adopt the reasonings of Mummery J and accordingly reject the notion that this court cannot grant the injunction order against AGB as contended, notwithstanding that no cause of action has been
I made out against it.

[70] Next, it is contended that CAB and CMSB have already agreed to provide an undertaking to the plaintiffs that the relevant shares would be unencumbered and that the relevant shares would be transferred in accordance with the terms of the SHA and the CTN in the event that such an order is made in the final awards by the arbitral tribunal ('the undertaking'). Based on the undertaking, it is contended that there is no longer a need for any interim measures since the plaintiffs' final reliefs in the arbitration proceedings have been safeguarded.

[71] Again, with respect, I disagree. The plaintiffs' concerns are the potential harm that can arise with Digi, as a competitor of TTSB, being directly in control of CAB and indirectly in control of the relevant shares and CMSB during the period when the arbitration proceedings are still pending as alluded to above. The risks of harm to the plaintiffs and TTSB arising from the aforesaid may result in irreparable loss or render any final awards in favour of the plaintiffs academic or nugatory. In other words, the risks to the plaintiffs extend beyond merely preserving their rights to purchase the proportionate relevant shares. It is also necessary to preserve the *status quo* in terms of the control of CAB and CMSB. The undertaking itself is insufficient to preserve the *status quo* pending the arbitration proceedings.

[72] Learned counsel for AGB, CAB and CMSB has raised the spectre of the proposed merger with Digi failing in the event that an injunction is ordered restraining the intended sale to Digi of the relevant shares. In such any event, it is contended that potential losses to AGB will be substantial and questioned the plaintiffs' ability to meet any undertaking as to damages.

[73] Again, with respect to learned counsel, whether or not the proposed merger will fail in the event an injunction is granted prohibiting the intended sale of the relevant shares to Digi is yet to be seen and as it stands, pure speculation. There is no reason why the usual undertaking as to damages by the plaintiffs is inadequate for the moment. There is always liberty for AGB to apply for the undertaking as to damages to be fortified if the circumstances were to change to its detriment.

[74] Before concluding on Prayer A, I must refer to the case of *KNM Process Systems Sdn Bhd v. Lukoil Uzbekistan Operating Company LLC* [2020] 1 LNS 479; [2020] MLJU 85, where our Court of Appeal in considering interim measures under s. 11(1)(f) and (h) of the AA 2005, after referring to the abovementioned passages by Lord Mustill had gone on to hold as follow:

> [42] The basic claim, in fact, the whole claim of the appellant was about an alleged fraudulent, unconscionable and/or unlawful call on the guarantees. That was the dispute. The respondent had moved the Court to direct that dispute be referred to arbitration, this was in keeping with the arbitration agreement in the underlying contracts. The appellant then moved for an interim injunction on the calls so that *status quo* may be

maintained pending arbitration. The application was refused not on the ground that *status quo* was not made out, but because a strong *prima facie* case was not established.

[43] We are of the view that since s. 11 has itself set the parameters upon which interim measures may be granted, those principles must be given due and proper regard and application. The interim injunctive measure that the appellant was seeking falls within the second category of cases that Lord Mustill talked about and discussed above; that is, to maintain the *status quo* pending arbitration so as to prevent one party from bringing about a change of circumstances adverse to the other which the arbitrators cannot adequately remedy.

[44] In the case of an interim injunctive relief pending arbitration, the applicant must first show why *status quo* needs to be maintained or restored, as the case may be. There are nevertheless tests that must be met before the Court will exercise its discretion in granting the particular order sought, that such order ought to be granted as it will ultimately aid or support the arbitration that is either pending or yet to take place.

[45] The tests that must be met are as set in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah* [1995] 1 MLJ 195:

i. whether there is any *bona fide* serious issue to be tried;

ii. whether damages are an adequate remedy; and

iii. where the balance of convenience lies.

[46] We would see the third requirement as material in that the appellant must show that the balance of convenience lies in maintaining or restoring *status quo* pending arbitration. However, where the injunctive relief concerns performance bonds, guarantees and warranties, the applicant must in addition, show a strong *prima facie* case of fraud or unconscionability but the merits and substantive arguments of such an allegation is to be determined at the arbitration, and not by the Court. The Court in fact, must avoid engaging or being caught up in protracted consideration of the merits of such dispute ...

[52] Although *Sumatec* and the cases discussed thus far do not concern calls and injunctive reliefs in the context of interim measures pending arbitration invoked under s. 11 of the Arbitration Act 2005, we are of the view that the principles apply with equal force but with the caveat that the Court must now weigh into consideration the question of whether *status quo* pending arbitration ought to be maintained or restored; whether some current or imminent harm to the arbitral process needs to be prevented; or any other similar considerations as found in section 11(1)(a) to (e). In fact, as seen from the decisions of *Metrod (Singapore) Pte Ltd (supra)*; *Jiwa Harmoni Offshore Sdn Bhd v. Ishi Power Sdn Bhd (supra); Cobrain Holdings Sdn Bhd v. GDP Special Projects Sdn Bhd (supra)* and *Obnet Sdn Bhd v. Telekom Malaysia Berhad (supra)* the courts have already taken that approach; that the grant of the particular interim measure must be in aid or support of or to facilitate the arbitration'.

[75] In this case, even applying the tests in *Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 195 as stated by our Court of Appeal in *KNM Process Systems Sdn Bhd v. Lukoil Uzbekistan Operating Company LLC* (*supra*) which is binding on me, I still reach a similar conclusion that the injunction in Prayer A ought to be granted.

[76] In the first place, the parties are not saying that there is no *bona fide* serious issues to be tried. As regards the adequacy of damages, learned counsel for AGB, CAB and CMSB has referred the court to the undertaking. However, for the reasons stated in para. [72] above, I do not think that damages will be an adequate remedy in this case if an injunction order is not granted. Finally, I also find that the balance of convenience lies in favour of the court granting the injunction sought for in Prayer A in order to preserve and protect the arbitral tribunal's final awards.

Prayers B And C(i) & (ii)

[77] I will now turn to the plaintiffs' interim measures applied for in Prayers B and C(i) and (ii) of encl. 37.

[78] The plaintiffs are seeking in Prayer B an injunction to prohibit CAB whether by itself or through its servants, officers or agents from amending, varying or otherwise changing the terms of the MVNO Agreement with TTSB.

[79] In Prayer C(i) and (ii), the plaintiffs are seeking that:

(i) the directors of TTSB nominated by CMSB be prohibited by an injunction from casting any vote on any decision of the Board of Directors of TTSB; and

(ii) no decision requiring a positive vote by CAB or CMSB pursuant to the SHA or the company's constitution may be made unless with the agreement of all the remaining shareholders of TTSB.

[80] I do not see the necessity for this court to issue any further interim measures once an injunctive order is granted restraining AGB from selling the relevant shares to Digi. This will effectively restore the *status quo.*

[81] To issue the further said injunctive orders as applied for by the plaintiffs in Prayers B and C (i) and (ii) will be to interfere with the terms of the MVNO and the SHA. This will be making a change to the existing *status quo* instead of preserving the same which is outside the scope of s. 19J(1) of the AA 2005.

[82] The plaintiffs have not demonstrated that there is any urgency for such interim measures to be issued and or that such application, if deems fit, could not be made to the arbitral tribunal under s. 19(1) and (2) of the AA 2005.

[83] Accordingly, I am not inclined to grant the injunctions as prayed in Prayers B and C(i) and (ii) of encl. 37.

Group Of Companies Doctrine/ Dow Chemicals Principle

[84] In arriving at my decision for encl. 37, I have not addressed the submissions by learned counsel for the plaintiffs on the Group of Companies doctrine that he had sought to rely upon to support the injunction order against AGB, a non-party to the arbitration agreement.

[85] International arbitral tribunals recognise the concept that when one company in a group of companies signs an arbitration agreement, that agreement can in some cases extend to bind other companies within the same group. The principle is often called the 'Dow Chemicals' principle named after the decision of the ICC Court of Arbitration in Paris in *Dow Chemicals v. Isover Saint-Gobain*, ICC Award No. 4131.

[86] The Indian Supreme Court in *Mahanagar Telephone Nigam Ltd v. Canara Bank* 2019 SCC Online SC 995 allowed the inclusion of a non signatory party to a single composite arbitration by invoking the 'Group of Companies' doctrine. It laid down the circumstances in which such doctrine can be invoked by the courts. After referring to the ICC award in *Dow Chemicals* (at 10.4), the court observed as follows:

> 10.4 …
>
> The 'Group of Companies' doctrine has been invoke by courts and tribunals in arbitrations, where an arbitration agreement is entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement, if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the nonsignatory affiliates in the group.
>
> The doctrine provides that *a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement* and the non signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the nonsignatory will also be bound and benefitted by the relevant contracts.
>
> The circumstances in which the 'Group of Companies' Doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject matter; the composite nature of the transaction between the parties.

A 'composite transaction' refers to a transaction which is interlinked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.

10.5 The Group of Companies Doctrine has also been invoked in cases where *there is a tight group structure with strong organizational and financial links,* so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funs of one company are used to financially support or re-structure other members of the group. (emphasis added)

[87] Learned counsel for the plaintiffs had gone into great details in his written submission on the relationship between AGB and CAB/CMSB, the extent of control that AGB had over CAB and the contents of various announcements and statements made by AGB in relation to the relevant shares to persuade this court that the circumstances in this case justify the application of the Group of Companies doctrine such that an injunction can be issued against AGB notwithstanding that AGB is not a party to the arbitration agreement. Reference was also made to the concealment principle that was adopted by our Federal Court in *Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors* [2021] 4 CLJ 821; [2021] 3 MLJ 622 which refers to when the court looks beyond the veil to see the true facts which are being concealed by the veil without actually lifting the veil.

[88] As I have already determined that the court can issue an interim injunction against AGB even though it is a non-party to the arbitration agreement, there is no need for this court to consider the merits or otherwise of the Group of Companies doctrine submission. I am sure there will be other occasions to explore the application of this interesting doctrine.

Conclusion

[89] In the premises, I will allow Prayer A of encl. 37, with liberty to apply and with costs fixed at RM25,000 to be paid jointly and severally by AGB, CAB and CMSB subject to payment of allocator. Enclosures 7 and 8 are dismissed.